# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 574

UNITED STATES, PETITIONER

*v.*

ESTATE OF JOSEPH P. GRACE, DECEASED, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## REPLY MEMORANDUM FOR THE UNITED STATES

1. Contrary to respondents' contention (Br. 2–13), the petition for a writ of certiorari was timely applied for—*i.e.* it was filed (28 U.S. 2101) "within ninety days after the entry" of the judgment of the Court of Claims—and is therefore within this Court's jurisdiction. The petition was filed on September 26, 1968, within ninety days after the Court of Claims' entry of judgment on June 28, 1968. Although the opinion of the Court of Claims, entered April 19, 1968, stated (Pet. App. 68a) as its Conclusion of Law that respondents "are entitled to recover, and judgment is entered to that effect", that did not constitute

a final judgment which started the running of the 90-day period. As that decision expressly indicated (*ibid.*), "[t]he amount of recovery will be determined pursuant to Rule 47(c)" of the Court of Claims.

Under the Court of Claims practice this meant that the case had to be remanded to the trial commissioner for further inquiry into the amount to be recovered, and that the court's final action could not and would not be taken until the trial commissioner had made his determination, and, if necessary, that decision had been reviewed by the court.[1] In this case there was little room for controversy before the Commissioner, but that does not negative the fact that the action of the Court of Claims was not final until he had acted, and the Court of Claims had entered its judgment, which it did on June 28, 1968. (Pet. App. 69a, 71a.)

Where, as here, a court's decision indicates on its face that further proceedings, or formal judgment or order will follow, the decision is not a final judgment for purposes of certiorari or appeal to this Court. *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, 284–288; *Puget Sound Co.* v. *King County*, 264 U.S. 22, 24–25; *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227. The fact that the judgment could have been computed from the prior record or decision is immaterial, and "however final the decision may be, it is not the judgment." *Puget Sound Co.* v. *King*

[1] This practice of the Court of Claims has been described by the clerk of that court in Peartree, *Statistical Analysis of the Court of Claims*, 55 Georgetown L. J. 541, 547, and n. 38 (1966).

*County, supra,* 264 U.S. at 25. Thus, in *United States* v. *Bianchi & Co.,* this Court granted certiorari, 371 U.S. 939, and decided the merits, 373 U.S. 709, notwithstanding the argument presented by the respondent in its brief in opposition, and answered by the government in a reply memorandum (No. 529, October Term, 1962) that the time for filing the petition expired ninety days after the Court of Claims' decision as to liability.

The government no doubt could have filed a petition upon the entry of decision here on April 19, 1968. That, however, is not because the entry of decision constitutes a "final judgment", but because this Court may review both interlocutory and final decisions of the Court of Claims. See, *e.g., United States* v. *Utah Construction & Mining Co.,* 384 U.S. 394; *United States v. Adams,* 383 U.S. 39, 41–42; *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155; *United States* v. *Caltex, Inc.,* 344 U.S. 149; *Marconi Wireless Co.* v. *United States,* 320 U.S. 1. This flexibility is emphasized by the wording of the statute governing review of cases in the Court of Claims. Thus 28 U.S.C. 1255, states: "Cases in the Court of Claims may be reviewed by the Supreme Court by * * * writ of certiorari * * *". It carefully avoids limiting review to "final judgments or decrees", the language used in

28 U.S.C. 1257 to define this Court's jurisdiction to review State court decision.

2. As for the merits, respondents misconceive the essence of the "reciprocal trust doctrine" developed by the courts and approved by Congress (see Pet. 7–12) in contending that this case presents "purely a question of fact" (Br. 38–39), and in attempting to resolve the conflict between this case and those relied upon by the Government by drawing tenuous "factual" distinctions between them (Br. 21–35). The cases that conflict with the decision here do not, as respondent assumes, turn on whether the decedent's inter vivos gift in trust for his wife's lifetime benefit, and her gift in trust for his lifetime benefit, were subjectively "intended" to furnish "'consideration" or a "*quid pro quo*" for each other. Rather the test

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[1] *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206 (see Br. 8–9), is irrelevant. There the court of appeals entered a final judgment that reversed the single contested part of a three part Federal Trade Commission cease and desist order, but that did not mention the two uncontested parts. The Commission filed a memorandum several weeks after the time for a petition for rehearing had elapsed, asking that the uncontested parts be enforced. The court of appeals then entered another judgment reiterating the reversal of the first part and affirming and providing for the enforcement of the other two parts. In dismissing the writ as untimely sought, this Court held only that once a final judgment is entered, the time for petitioning may not be enlarged except by a timely petition for rehearing or by a subsequent decree that (*id.* at 211) "changes matters of substance, or resolves a genuine ambiguity". Here the first judgment stated no money amount. It was only the judgment of June 28, 1968, that provided that the respondent was entitled to recover "four hundred nineteen thousand two hundred twenty-one dollars and five cents ($419,221.05), together with interest thereon from from July 14, 1954, as provided by law." (Pet. App. 69a.)

hinges on the net economic effect of the cross-transfers, and not on the motives—tax or otherwise—of the transferors. As the Eighth Circuit said in *Cole's Estate* v. *Commissioner*, 140 F. 2d 636, 638, to the extent that one trust is a substitute for the assets of the other, "there was no change in the economic position of either grantor."[3] See, also, Lowndes, *Consideration and the Federal Estate and Gift Taxes*, 35 Geo. Wash. L. Rev. 50, 80.

Respondents distinguish *Hanauer's Estate* v. *Commissioner*, 149 F. 2d 857 (C.A. 2), certiorari denied, 326 U.S. 770, on the theory (Br. 26) that there the wife created the trust in the decedent-husband's favor "because" he had created one in her favor, whereas here the wife did not "know" of the decedent's trust and created hers "merely because the decedent requested that she do so." Neither *Hanauer* nor any other of the cases following *Lehman* v. *Commissioner*, 109 F. 2d 99 (C.A. 2), suggest that the reciprocal trust doctrine is any less applicable where the reciprocal trusts are brought about by one of the spouses acting on behalf of both. On the contrary, the doctrine would seem *a fortiori* applicable where, as here, one of the spouses is entirely passive and leaves it to the other to plan and effect the reciprocal gifts in trust.

Here the majority of the Court of Claims determined that the two trusts were executed within a span of two weeks, were virtually identical in terms,

[3] It is of course immaterial to observe as respondent does (Br. 29), that in *Cole*, the estates of both spouses were before the court.

were executed "in accordance with the plan of the decedent," and were "parts of what was essentially a single transaction" (Findings 10–11(a), 12(a), 13, 53(a); Pet. App. 9a–10a, 37a–39a, 43a–45a, 47a, 67a, 68a), and that the decedent "caused his wife" to execute her trust in his favor (Pet. App. 16a). On this record it is plain that every circuit which has considered the problem—with the possible exception of the Third—would have held for the government, so that there is indeed a conflict.

3. In asserting (Br. 35–36) that the issue here involved is of no "current importance," because this case is "the only solitary case in which any court in the country has been called upon to decide the issue of applicability of the reciprocal trust doctrine during the present decade", respondent completely ignores the fact that the lack of litigation in the last several years is but a consequence of the inability of taxpayers to persuade the courts of the legitimacy of the cross-trust device. They are, moreover, wrong in their claim that taxpayers, to take advantage of the decision here, must risk needless gift taxes. Gift tax rates are considerably lower than estate taxes (see Internal Revenue Code of 1954, Sections 2001 and 2502). Section 2012 of the Code allows a credit for gift tax paid in respect of a gift required to be included in the gross estate; and it even has been suggested that it is advantageous to risk the estate tax controversy on the ground that the gross estate would be reduced in any event by the amount of gift tax previously paid. See Lowndes and Kramer, *Federal Estate and Gift Taxes* (2d ed., 1962), 75; Warren and Surrey, *Federal Estate and Gift Taxation* (1961), 255. There is

nothing to be lost, therefore, by renewed attempts by wealthy individuals to diminish their taxable estates by the intra-family reciprocal trust device, unless the Court grants review and forecloses the prospect that such attempts may meet with success at least in some of the lower federal courts.

Respectfully submitted.

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